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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ANDRE TERIAL LOVE, Defendant and Appellant.	2d Crim. No. B287570 (Super. Ct. No. 2016022147) (Ventura County)

Andre Terial Love appeals from the judgment after a jury convicted him of five counts of second degree robbery (Pen. Code,[1] §§ 211, 212.5, subd. (c)). Love admitted allegations that he suffered three prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and one prior serious felony conviction (§ 667, subd. (a)), and that he served three prior prison terms (§ 667.5, subd. (b)). The trial court sentenced him to 75 years to

[1] All further unlabeled statutory references are to the Penal Code.

life in prison plus 15 years. It awarded him 540 days of actual custody credits and zero days of presentence conduct credits.

Love contends the trial court erred when it: (1) admitted evidence of his 2011 possession of a firearm and "robbery tools" and evidence of a robbery he committed in Florida in 2006, and (2) omitted the former incident from its limiting instruction on how the jury could consider the uncharged crimes evidence. He also contends: (1) two of the prior prison term enhancements should be stricken, (2) the case should be remanded to permit the trial court to exercise its discretion to impose or strike the serious felony enhancements, and (3) he is entitled to presentence conduct credits. We affirm Love's convictions, and remand.

FACTUAL AND PROCEDURAL HISTORY

Bandits Grill & Bar is a restaurant located near U.S. Highway 101 (US-101) in Thousand Oaks. Around 11:30 p.m. on a Sunday in July 2015, Bandits's general manager, R.E., walked outside to lock the doors. A man—later described as a 6'2"-tall[2] African-American wearing a hoodie and bandana—jumped from behind the trash enclosure and put a gun to R.E.'s head. He told R.E. to unlock the restaurant door and give him the money inside. He instructed R.E. not to look at him.

Once inside, R.E. told the robber the restaurant did not have a safe. The robber replied, "What do you mean you don't have a safe? . . . Don't mess with me. This isn't my first rodeo." R.E. gave the robber cash from the restaurant and employee paychecks. The robber then ziptied R.E.'s hands together, forced him into an office, told him not to move, and left. Police later tested DNA found on the zipties, and determined that it was 246

[2] R.E. originally told police the man was 5'10" tall.

times more likely to have come from Love than from another person.

Al Mulino Italian Restaurant & Bar is located near US-101 in Thousand Oaks. Just before 11:00 p.m. on a Sunday in May 2016, L.O., a custodian at the restaurant, was finishing his cleaning shift. A man walked in the back door and demanded to see the owner. He was holding a gun. L.O. told the man that he was the only person at the restaurant.

The robber pointed his gun at L.O. and demanded his wallet. He also took L.O.'s cell phone. He then forced L.O. into the bathroom, locked the door, and told him he would shoot him if he did not remain there for 30 minutes.

L.O. described the robber as an African-American or Hispanic man standing about 5'8" tall. His face and head were covered and he was wearing gloves.

Cisco's Mexican Restaurant is located near US-101 in Thousand Oaks. Around 10:40 p.m. on the Sunday following the Al Mulino robbery, C.B. and A.S. were counting money in the Cisco's office when a man with a gun entered. He announced that he was robbing the restaurant, and instructed C.B. and A.S. not to look at his face.

The robber told C.B. and A.S. to put money in one of the office trashcans. He also demanded money from their wallets. When J.N. entered the office, the robber pointed the gun at him and demanded money from his wallet, too.

The robber took C.B.'s and A.S.'s cell phones and hid them outside the office. He said he would shoot the workers if they opened the office door or called police.

Another Cisco's employee, C.S., was at the dumpster outside while the robber was in the office. He noticed a white car

in the parking lot. Someone was in the driver's seat, and the motor was running. As C.S. walked back toward the restaurant, a man armed with a gun ran out the back door. He told C.S. to go inside, but C.S. ran across the street instead. The robber signaled to the driver of the white car and fled on foot.

The robber wore a hoodie, a bandana over his face, and ski gloves. C.B. and J.N. thought he was African American; A.S. described him as Hispanic with dark skin. All three said he was between 5'10" and 6'0" tall.

Sheriff's deputies found a "burner" cell phone outside the back door of Cisco's. It was purchased four days before the robbery, from a store one block from Love's apartment in Sylmar. Love's DNA was on the phone. So were his fingerprints. It was registered in his name. Cisco's employees said the phone was not at the restaurant prior to the robbery.

The burner phone was used near Love's apartment in the days leading up to the Cisco's robbery. The last activity occurred around 10:00 p.m. on the night of the robbery. The only contact stored in the phone matched one in Love's personal cell phone.

Data from Love's personal cell phone show that it was used in Thousand Oaks, near US-101, at 9:39 p.m. on the night of the Bandits robbery. The phone was used along US-101 between San Fernando and Thousand Oaks around 9:00 p.m. the night of the robbery at Al Mulino. It was used several times near Cisco's starting at 11:09 p.m. the night of the robbery there, but began to move toward Los Angeles along US-101 at 11:46 p.m. The phone had little or no activity when the robberies occurred, in contrast to many other nights when the phone showed significant activity between 10:00 p.m. and 7:00 a.m. The dates

and times of the robberies were among the few occasions Love's cell phone was in Ventura County at night.

Detectives executed a series of search warrants one month after the Cisco's robbery. At Love's apartment they found bandanas, hoodies, a beanie, ski masks, a wig, and several pairs of gloves. Inside his work locker were several pairs of gloves, a beanie, a ski mask, and a backpack that contained more than $1,900. At his mother's house were three more wigs. Detectives were unable to match any of the clothing found during the searches to that shown in surveillance videos of the robberies. They recovered no firearms.

Prior to trial, the prosecutor moved to admit evidence of a 2011 traffic stop involving Love. When a sheriff's deputy pulled over the car Love was driving, he saw a firearm and 10 rounds of ammunition on the floorboard. Also in the car were "robbery tools": a crowbar, duct tape, rope, binoculars, two pairs of handcuffs, and a wig. The deputy confiscated Love's firearm after the stop.

The prosecutor also moved to admit evidence of a robbery Love committed at a restaurant near a Florida highway in 2006. Around 11:30 p.m., Love emerged from behind the restaurant's dumpster and told two workers to go inside. He was carrying a pellet gun. Love forced the restaurant workers into an office and demanded money and cell phones. He threatened to shoot the workers if they left the office.

During the robbery, Love wore a baseball cap, a bandana over his face, and gloves. He had ponytails in his hair. Later that night, police found a baseball cap with a wig attached to it in Love's rental car.

The prosecutor claimed the uncharged crimes evidence was admissible to prove the identity of the Thousand Oaks robber and that the robber acted according to a common plan or scheme. Love objected. He argued the evidence was irrelevant, remote in time, inadmissible character or propensity evidence, and unduly prejudicial. The trial court disagreed. It deemed the evidence of both incidents more probative than prejudicial, and noted that the jury would be instructed not to consider it for propensity purposes.

At trial, Love's wife testified that she and Love were saving money for a vacation. She said that Love lived within his means and that she had not seen him with an excessive amount of cash. There was never a Sunday she did not see her husband for an extended period of time. He did not ski or snowboard. The wigs police found at their apartment were hers.

Love's mother testified that she owned the wigs police found at her house. She had never seen Love wear them. Love had not lived with her for nearly a decade, though he did visit.

A coworker testified that Love occasionally worked in Thousand Oaks. He worked all hours of the day, sometimes in remote, high-elevation locations, and needed cold-weather clothing. Because Love rode a motorcycle, his company provided him with a locker to store his clothing.

A cousin testified that Love had taken out a loan of $13,000 to $14,000 to buy his motorcycle.

At the conclusion of testimony, the trial court discussed jury instructions with counsel off the record. Before the court instructed the jury, Love's attorney agreed that the

instructions were complete. He did not object to or request any change to the instructions.

The trial court instructed the jury that it could consider evidence of the Florida robbery for the limited purposes of deciding whether Love was the perpetrator of the Thousand Oaks robberies and whether he did so as part of a common plan or scheme. The jury was not to conclude from that evidence that Love had a bad character or was disposed to commit crime. The court also told the jury that Love could not be found guilty of the Thousand Oaks robbery based solely on the commission of the Florida robbery. (See CALCRIM No. 375.) The instruction did not mention Love's 2011 possession of a firearm and robbery tools.

While the jury deliberated, Love admitted allegations that he suffered three prior strike convictions for two robberies committed in Los Angeles in 1994 and the robbery he committed in Florida in 2006. He admitted the latter offense also qualified as a serious felony and that he served a prison term for its commission. He admitted allegations that he served two additional prison terms, one for the possession of a firearm in 2011 and another for a burglary he committed in 1997.

The jury convicted Love of five counts of second degree robbery, but found not true allegations that he used a firearm to commit his crimes (§§ 12022.5, subd. (a), 12022.53, subds. (a)(4) & (b)). Pursuant to the three strikes law, the trial court sentenced Love to consecutive terms of 25 years to life in prison on three of his convictions. It added a consecutive five-year determinate term to each sentence for his prior serious felony. The court imposed concurrent terms of 25 years to life plus five years on the two remaining convictions, and stayed the

three one-year sentence enhancements for his prior prison terms.[3] It awarded Love 540 days of actual custody credits and no presentence conduct credits.

DISCUSSION

Uncharged crimes evidence

Love contends the trial court erroneously admitted evidence of his 2011 possession of a firearm and robbery tools and his 2006 robbery because those offenses were not sufficiently similar to the Thousand Oaks robberies to be relevant to the issue of identity, and the existence of a common plan or scheme was not at issue. We conclude that any error in admitting such evidence was harmless.

Evidence that a defendant has committed uncharged crimes is admissible to prove the defendant committed a charged crime or did so as part of a common plan or scheme. (Evid. Code, § 1101, subds. (a) & (b).) To admit such evidence, the trial court must determine that: (1) the evidence is relevant to "prove the issue[s] upon which it is offered," (2) the issues to be proved are material, and (3) Evidence Code section 352 does not require exclusion of the evidence. (*People v. Schader* (1969) 71 Cal.2d 761, 775.) Uncharged crimes evidence "'contains within itself a substantial degree of prejudice and should be received with "extreme caution."'" (*People v. Holt* (1984) 37 Cal.3d 436, 451, alterations omitted.) If there is "'uncertainty as to its connection

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[3] The reporter's transcript indicates the trial court stayed the three prior prison term enhancements, but the corresponding minute order shows that the enhancements were stricken. The enhancements also do not appear on the abstract of judgment. The reporter's transcript controls. (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 249.)

with the offense charged "the doubt should be resolved in favor of the accused." [Citation.]' [Citation.]" (*Ibid.*)

"The greatest degree of similarity is required for evidence of uncharged [crimes] to be relevant to prove identity." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403 (*Ewoldt*).) "[T]he inference of identity arises when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses." (*People v. Haston* (1968) 69 Cal.2d 233, 246.) Thus, to be relevant to issue of identity, the uncharged crimes must be "highly similar" to the charged crimes. (*People v. Kipp* (1998) 18 Cal.4th 349, 369-370.) The two crimes must share "common features that are sufficiently distinctive" (*Ewoldt*, at p. 403), and must display a "'pattern and characteristics . . . so unusual and distinctive as to be like a signature'" (*ibid.*). Those similarities "virtually eliminate[] the possibility that anyone other than the defendant committed the charged offense." (*People v. Balcom* (1994) 7 Cal.4th 414, 425.) Whether that possibility exists—and whether the uncharged crimes evidence is relevant and admissible—depends on "'(1) the degree of distinctiveness of individual shared marks, and (2) the number of minimally distinctive shared marks.' [Citation.]" (*Kipp*, at p. 370, italics omitted.)

Proving the existence of a common plan or scheme requires a lower degree of similarity. (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.) The uncharged crimes evidence "must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be

explained as caused by a general plan of which they are the individual manifestations.' [Citation.]" (*Ibid.*) That plan "need not be distinctive or unusual," but must be more than "a series of similar spontaneous acts." (*Id.* at p. 403.) "[I]t need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*Ibid.*)

We review the trial court's admission of uncharged crimes evidence for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.)

The trial court abused its discretion when it admitted evidence of Love's 2011 possession of a firearm and robbery tools on the issue of identity because that evidence was not relevant to prove that Love committed the Thousand Oaks robberies. The two incidents shared a single similarity: the presence of a firearm. But that similarity "break[s] down under examination." (*People v. Alcala* (1984) 36 Cal.3d 604, 632 (*Alcala*), abrogated by statute on another ground as stated in *People v. Hovarter* (2008) 44 Cal.4th 983, 1018.) The firearm Love possessed in 2011 was confiscated, and there is no evidence it was ever returned. Evidence that Love possessed a firearm not used in the Thousand Oaks robberies was thus irrelevant other than to show "that he is the sort of person who carries deadly weapons." (*People v. Riser* (1956) 47 Cal.2d 566, 577, overruled on another point by *People v. Morse* (1964) 60 Cal.2d 631, 653.)

There were also several significant differences between Love's 2011 possession of robbery tools and the Thousand Oaks robberies. A crowbar was not used in any of the Thousand Oaks robberies. Nor was duct tape, rope, binoculars, or handcuffs. And none of the victims said the robber wore a wig. "These numerous dissimilarities support our conclusion that

whatever similarities exist between the [2011 incident and the Thousand Oaks robberies] do not 'yield a distinctive combination.' [Citation.]" (*People v. Harvey* (1984) 163 Cal.App.3d 90, 102; see also *People v. Rivera* (1985) 41 Cal.3d 388, 392-393, disapproved of on another ground by *People v. Lessie* (2010) 47 Cal.4th 1152, 1168, fn. 10; *Alcala*, *supra*, 36 Cal.3d at pp. 632-635.)

The Attorney General argues that evidence of Love's 2011 possession of a firearm and robbery tools was admissible to show the existence of a common plan or scheme, thus it is of "no consequence" that the trial court erroneously admitted the evidence to prove the identity of the Thousand Oaks robber. (See *People v. Chism* (2014) 58 Cal.4th 1266, 1307, fn. 13.) The Attorney General misreads *Chism*. In *Chism*, the Supreme Court held that evidence of the defendant's prior robbery was admissible on the issues of identity and intent in his trial for the attempted robbery of a liquor store. (*Id.* at p. 1307.) Because the admission of uncharged crimes evidence on the issue of identity requires the uncharged crime to have "[t]he greatest degree of similarity" with the charged crime (*Ewoldt*, *supra*, 7 Cal.4th at p. 403), its admission on the issue of knowledge—which requires a lower degree of similarity (*id.* at pp. 402-403)—was "of no consequence" (*Chism*, at p. 1307, fn. 13). It does not follow that uncharged crimes evidence requiring a *higher* degree of similarity with the charged crime is admissible simply because it meets a *lower* admissibility threshold.

Moreover, "evidence of a common design or plan is admissible only to establish that the defendant engaged in the *conduct* alleged to constitute the charged offense." (*Ewoldt*, *supra*, 7 Cal.4th at p. 406, italics added.) Here, there was no dispute that the Thousand Oaks robberies occurred, or about how

they were committed. "Evidence presented on a nondisputed issue is irrelevant and, hence, inadmissible." (*People v. Coleman* (1979) 89 Cal.App.3d 312, 321, italics omitted.)

And even if evidence of the 2011 incident were admissible to prove the existence of a common plan or scheme, the trial court should have excluded it as unduly prejudicial. As our Supreme Court explained in *Ewoldt*, where it is "beyond dispute" that someone committed the charged offense, and the only issue to be determined is whether the defendant was that someone, evidence of a common plan or scheme is "merely cumulative[,] and the prejudicial effect of the evidence of uncharged [crimes] . . . outweigh[s] its probative value." (*Ewoldt*, *supra*, 7 Cal.4th at p. 406.) Here, the only contested issue was whether Love committed the Thousand Oaks robberies. Evidence of his 2011 possession of a firearm and robbery tools did little more than demonstrate that he was predisposed to commit armed robbery. (*People v. Sam* (1969) 71 Cal.2d 194, 206.) That is precisely the type of evidence Evidence Code section 1101 renders inadmissible.

Though a closer call, a similar argument can be made regarding the trial court's admission of evidence of Love's 2006 robbery. (See, e.g., *People v. Vines* (2011) 51 Cal.4th 830, 857 [noting there is "nothing particularly distinctive about an armed robbery of a McDonald's restaurant at closing time"], overruled on another ground by *People v. Hardy* (2018) 5 Cal.5th 56, 104.) We need not resolve that issue, however, because, as we explain below, any error in admitting that evidence was harmless.

Instructional error

Love contends the trial court erred when it omitted his 2011 possession of a firearm and robbery tools from its

instruction on how the jury could consider the uncharged crimes evidence.[4] We agree.

In general, the trial court has no sua sponte duty to instruct the jury on the limited use of uncharged crimes evidence. (*People v. Collie* (1981) 30 Cal.3d 43, 64; see Evid. Code, § 355.) But when the court does provide a limiting instruction, the instruction should be accurate. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) We independently review whether the court accurately instructed the jury here. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

We review "the instructions as a whole in light of the entire record" (*People v. Lucas* (2014) 60 Cal.4th 153, 282, disapproved on another ground by *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19), with the assumption that jurors are "capable of understanding and correlating" all of the instructions given (*People v. Mills* (1991) 1 Cal.App.4th 898, 918).

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[4] We reject the Attorney General's argument that Love forfeited his contention because he did not request that the trial court include the 2011 incident in its instruction. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) Because an erroneous instruction on the use of evidence of uncharged crimes affects a defendant's substantial rights (*People v. Harris* (1981) 28 Cal.3d 935, 956), the defendant may argue, for the first time on appeal, that the instruction was erroneous (§ 1259).

We also reject the Attorney General's assertion that Love invited the erroneous instruction when defense counsel acquiesced to it at trial. (See *People v. Bolin* (1998) 18 Cal.4th 297, 326.) The invited error doctrine is inapplicable here because the record shows no tactical reason why counsel acquiesced in the instruction; it was discussed off the record. (*People v. Moon* (2005) 37 Cal.4th 1, 28.)

We give the instructions a reasonable, rather than technical, interpretation (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1074), and interpret them to support the judgment, if at all possible (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258). We also consider the arguments of counsel to assess the instructions' impacts on the jury. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.) Our duty is to determine "whether there is a reasonable likelihood that the jury misunderstood and misapplied the [allegedly erroneous] instruction." (*People v. Mayfield* (1997) 14 Cal.4th 668, 777, abrogated on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.)

Viewed in light of the whole record, it is reasonably likely the jury misapplied the trial court's limiting instruction on the use of uncharged crimes evidence. Where, as here, the court tells the jury that an instruction applies to one body of evidence (e.g., Love's 2006 robbery), but does not say that it applies to another (e.g., the 2011 possession of a firearm and robbery tools), a reasonable juror is likely to misunderstand the proper scope of the instruction. (*People v. Salas* (1976) 58 Cal.App.3d 460, 474-475.) The attorneys' arguments did not help to clarify jurors' understanding because neither one told them they could consider the 2011 incident only on the issue of identity or the existence of a common plan or scheme. Thus, by omitting the 2011 incident from CALCRIM No. 375, the court erroneously permitted the jury to consider it for any purpose.

This case is like *Boyd v. United States* (1892) 142 U.S. 450, which our Supreme Court has cited with approval as demonstrating the longstanding American tradition of prohibiting the use of propensity evidence. (See *People v. Villatoro* (2012) 54 Cal.4th 1152, 1171.) In *Boyd*, the trial court

instructed the jury that it could consider evidence of one of the defendants' uncharged robberies on the issue of identity. (*Boyd*, at p. 456.) But the court did not tell the jury that evidence of the defendants' other uncharged robbery could similarly be considered for only that limited purpose. (*Id.* at p. 457.) Nor did the court's remaining instructions or the attorneys' arguments. (*Id.* at p. 458.) The uncharged robberies omitted from the court's limiting instruction thus "tended to prejudice the defendants with the jurors, to draw [jurors'] minds away from the real issue, and to produce the impression that [the defendants] were wretches whose lives were of no value to the community." (*Ibid.*) The same is true here.

Cumulative error

Love contends the trial court's erroneous admission of uncharged crimes evidence and its erroneous instruction on how the jury could consider evidence of his 2011 possession of a firearm and robbery tools, considered together, require reversal. We disagree under the circumstances of this case.

A trial court's evidentiary and instructional errors do not require reversal unless it is reasonably probable that the defendant would have obtained a different result at trial absent the errors.[5] (*People v. Watson* (1956) 46 Cal.2d 818, 836; see

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[5] Love argues the trial court's errors violated the federal Constitution, which requires us to apply the harmless-beyond-a-reasonable-doubt standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) We disagree. First, evidentiary errors violate due process only if: (1) "'there are no permissible inferences the jury may draw from the [erroneously admitted] evidence,'" and (2) the evidence is "'"of such quality as necessarily prevents a fair trial."'" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229.) Love does not analyze how the erroneous

People v. Falsetta (1999) 21 Cal.4th 903, 924-925 [failure to provide a limiting instruction on the use of uncharged crimes evidence]; *People v. Malone* (1988) 47 Cal.3d 1, 22 [admission of uncharged crimes evidence].) No such reasonable probability exists here.

The evidence indicates that the same person committed all three robberies in Thousand Oaks. All three robberies occurred at restaurants, around closing time, on the same night of the week. All three occurred in the same city, near freeway offramps, some 30 miles from Love's home. All three occurred in a similar manner, with the perpetrator coming in the back door of the restaurant, demanding money from employees, and instructing them to wait until he left before they called for help. And all three were perpetrated by a dark-skinned Hispanic or African-American man, standing between 5'8" and 6'2" tall, wearing a hoodie and bandana across his face.

The physical and circumstantial evidence indicate that Love was that person. Data from Love's personal cell phone placed him near the location of each of the robberies. The nights of the robberies were among the few times Love's cell phone was

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admission of uncharged crimes evidence deprived him of a fair trial. The argument is forfeited. (*People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1303.) Second, the *Chapman* standard applies to instructional errors only if those errors lowered the prosecution's burden of proof. (*People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 647.) Here, the trial court instructed the jury, multiple times, that it had to find Love guilty beyond a reasonable doubt to convict him. It said that standard of proof applied to all matters unless the court instructed otherwise. We presume the jury understood and followed these instructions. (*People v. Homick* (2012) 55 Cal.4th 816, 853.)

in Ventura County in the evening. And most significantly, police found Love's DNA on the zipties used in the Bandits robbery and on the burner phone left behind at Cisco's.

Finally, it is unlikely that the "jury's passions were inflamed by the evidence of [Love's] uncharged offenses." (*Ewoldt*, *supra*, 7 Cal.4th at p. 405.) The danger in admitting uncharged crimes evidence is "that the jury will conclude that [the] defendant has a criminal disposition and thus probably committed the presently charged offense." (*People v. Thompson* (1988) 45 Cal.3d 86, 109.) Here, evidence of the Florida robbery was unlikely to inflame the jury's passions because Love admitted the Bandits robbery was not his first: "This isn't my first rodeo." And though he used a weapon in the Florida robbery, and though police found him with a firearm during the 2011 traffic stop, the jury rejected allegations that he was armed with a firearm during the Thousand Oaks robberies. The jury thus did not accept the erroneously admitted evidence uncritically. (*People v. Williams* (2009) 170 Cal.App.4th 587, 613.) Considered together, the strong evidence tying Love to the Thousand Oaks robberies and the low likelihood the erroneously admitted evidence inflamed the jury's passions renders it improbable that Love would have obtained a different outcome absent the trial court's evidentiary and instructional errors.[6]

Prior prison term enhancements

Love contends, and the Attorney General concedes, the trial court erred when it stayed the one-year sentence enhancements on two of the prior prison term allegations he admitted. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1562

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[6] For the same reasons, the errors were harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

[failure to strike or impose a section 667.5, subdivision (b), enhancement is a jurisdictional error that may be raised for the first time on appeal].) We agree.

In general, a prior prison term sentence enhancement cannot be stayed. (*People v. Coronado* (1995) 12 Cal.4th 145, 157-158.) Unless the trial court strikes it, the enhancement must be imposed. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) But there is an exception to this general rule: If (1) a prior offense is alleged both as a serious felony and to have resulted in a prior prison term, (2) both allegations are found true, and (3) the court does not strike either finding, then (4) the court may impose punishment only on the greater enhancement. (*People v. Lopez* (2004) 119 Cal.App.4th 355, 363-365; see *People v. Jones* (1993) 5 Cal.4th 1142, 1149-1152.) In that case, the court should impose both enhancements and then stay execution of the lesser sentence. (*People v. Brewer* (2014) 225 Cal.App.4th 98, 104-105; see Cal. Rules of Court, rule 4.447(a).)

Here, the trial court properly stayed the one-year prior prison term sentence enhancement for the Florida robbery because it imposed five-year prior serious felony enhancements based on that offense.[7] But the court erred when it stayed the enhancements on Love's prison terms for firearm possession and burglary because those offenses were not bases for any other enhancement. On remand, the court must hold a hearing to exercise its discretion to impose or strike those enhancements. (*People v. Garcia*, *supra*, 167 Cal.App.4th at p. 1561.)

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[7] The abstract of judgment should be corrected to reflect that the trial court imposed and stayed this enhancement. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-188.)

Prior serious felony enhancements

When the trial court sentenced Love, section 667, subdivision (a), required it to add a five-year enhancement to the sentence on each of his convictions because of his prior serious felony conviction. Former subdivision (b) of section 1385 prohibited the court from striking those enhancements. Effective January 1, 2019, the court has discretion to strike the enhancements for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*); see § 1385, subd. (b)(1).)

Love contends, and the Attorney General concedes, the amendments to sections 667 and 1385 apply retroactively to his case because it is not yet final. We agree. (*Garcia*, *supra*, 28 Cal.App.5th at pp. 971-973; see *In re Estrada* (1965) 63 Cal.2d 740, 744.) On remand, the trial court must determine whether to impose or strike the five-year serious felony enhancement attached to each of the sentences on Love's robbery convictions.

Presentence custody credits

Love contends, and the Attorney General concedes, the trial court both miscalculated his actual custody credits and erred when it determined that he was ineligible for presentence conduct credits. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 420 [party may challenge presentence credit calculation for the first time on appeal].) We agree once again.

Defendants sentenced to prison are entitled to credits against their terms of imprisonment for all actual days spent in custody prior to sentencing, including the day of arrest and the day of sentencing. (*People v. King* (1992) 3 Cal.App.4th 882, 886; see § 2900.5, subd. (a).) And absent statutory authority to the contrary, they are also entitled to presentence conduct credits if they perform assigned labor and comply with jailhouse rules and

regulations. (§ 4019, subds. (a)(4), (b) & (c).) This includes defendants who, like Love, receive indeterminate life sentences. (See, e.g., *People v. Brewer* (2011) 192 Cal.App.4th 457, 461-464; *People v. Philpot* (2004) 122 Cal.App.4th 893, 907-909.) Presentence conduct credits are limited to 15 percent of the time spent in custody for defendants convicted of violent felonies. (§ 2933.1, subd. (c).)

Love was convicted of five violent felonies. (§ 667.5, subd. (c)(9).) He was in custody from his arrest on June 9, 2016, to sentencing on November 27, 2017, a total of 537 days. He is therefore entitled to up to 80 days of conduct credits if he performed his assigned labor and complied with jailhouse rules.

But the trial court made no findings on these issues, and it is inappropriate for this court to do so in the first instance. On remand, the court must determine whether Love performed labor and complied with jail rules. If he did, the court must calculate and award him conduct credits. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647 [incorrect calculation of custody credits is an unauthorized sentence that may be corrected at any time].)

DISPOSITION

Love's convictions are affirmed. The case is remanded to the trial court with directions to hold a hearing to: (1) exercise its discretion to impose or strike two of the prior prison term enhancements, (2) exercise its discretion to impose or strike the prior serious felony enhancements, (3) determine whether Love is entitled to presentence conduct credits, and, if so, (4) calculate and award those credits. Love has the right to the assistance of counsel at the remand hearing, and, unless he chooses to forgo it, the right to be present. After the hearing, the clerk of the court shall prepare an amended abstract of judgment

and forward a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Charles W. Campbell, Jr., Judge

Superior Court County of Ventura

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Gregory B. Wagner, Deputy Attorney General, for Plaintiff and Respondent.